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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SACRAMENTO COUNTY ATTORNEYS ASSOCIATION, Plaintiff and Appellant, v. COUNTY OF SACRAMENTO et al., Defendants and Respondents.	A104157 (Solano County Super. Ct. No. 02CS01905)

Sacramento County Attorneys Association (SCAA) appeals after the trial court denied its petition for writ of mandate against the County of Sacramento; County of Sacramento Board of Supervisors; Jan Scully, Sacramento County District Attorney; Paulino G. Duran, Sacramento County Public Defender; and Terry Abbott, Interim Department Head, Sacramento County Department of Child Support Services (collectively, the County). On appeal, SCAA contends the County violated relevant vacation accrual and benefit maintenance provisions by requiring attorneys in the offices of the District Attorney and Public Defender to take vacation leave to avoid exceeding the maximum of 400 hours in accrued vacation and, thereby, to avoid the need to cash out excess vacation leave pursuant to a County personnel ordinance. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Attorneys are assigned primarily to four legal offices within the County, including the Office of the District Attorney, the Office of the Public Defender, the Department of Child Support Services, and the Office of the County Counsel. Attorneys in the County

Counsel's Office are not formally represented in their employment relationship with the County, but instead are governed by County ordinances and resolutions, and policies and practices thereunder, including provisions regarding vacation leave. SCAA formally represents County attorneys in the offices of the District Attorney, Public Defender and Department of Child Support Services. Attorneys in these three offices, which have organized under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), are covered by a labor agreement—a memorandum of understanding (MOU)—negotiated between the County and SCAA. The current MOU took effect on December 30, 2001, and expires on June 30, 2006.

The MOU contains a benefit maintenance provision, which provides that "[d]uring the term of this Memorandum, employees shall receive any increase in benefits made generally applicable to Attorneys in the County Counsel's Office." (MOU, § 2.3.) The benefit maintenance provision thus provides for parity of benefits between represented and unrepresented attorneys without the need for frequent piecemeal negotiations between SCAA and the County with respect to any new benefit received by attorneys in the Office of the County Counsel.

The Sacramento County Personnel Ordinance (personnel ordinance), Sacramento County Code (SCC) section 2.100.090, provides that attorneys from the Office of the County Counsel may accrue up to a maximum of 400 hours vacation leave. That same section further provides that "[t]he County shall compensate management personnel for the monetary value of any vacation earned during any bi-weekly pay period which is in excess of the maximum accrual balance specified in this section." (*Ibid.*)[1] This vacation leave cash-out provision (cash-out provision) became operative on July 1, 1995.

[1] The County points out that, in its order denying the petition for writ of mandate, the trial court incorrectly cited SCC section 2.78.730 as the vacation management provision applicable to attorneys in the Office of County Counsel. That section, however, governs unrepresented non-management employees, while SCC section 2.100.090 governs management employees, including attorneys. Since the relevant language of both sections is the same, the trial court's error is not a material one.

SCC section 2.78.735(a) provides that "[t]he appointing authority shall determine the period when accrued vacation time may be taken by each employee, consistent with the requirements of the department." County Counsel has always permitted attorneys in his office to accrue vacation leave beyond the 400-hour maximum and receive a payout for the excess hours.

SCAA-represented attorneys may also accrue a maximum of 400 hours of vacation leave, pursuant to section 6.1(c) of the MOU. Section 6.1(d) of the MOU permits represented attorneys to use accrued vacation leave "[c]onsistent with the requirements of the department as determined by the appointing authority . . . as soon as it is accrued." Section 6.1(e) of the MOU further provides that, "[w]henever possible, vacations shall be granted at the time requested by the employee. In order to avoid undue disruption of work activities or to minimize conflicts with other employees' vacations, the appointing authority may place reasonable seasonal or other restrictions on the use of accrued vacation."

Since 1995, SCAA-represented attorneys have also received vacation leave payouts when their accrued vacation leave exceeds 400 hours. However, the department heads in the Offices of the District Attorney and Public Defender have periodically required attorneys in their offices to use vacation leave to avoid the necessity of cashing out vacation leave in excess of 400 hours.

On October 15, 2002, SCAA filed a grievance with the District Attorney and Public Defender, after it learned that these two offices would once again be requiring employees to use vacation leave as a means of eliminating vacation payouts.[2] SCAA asserted that "[t]he forced use of vacation leave to prevent employees from accruing the 400-hour maximum and eliminating the obligation to pay for additional bi-weekly vacation accruals above the 400-hour maximum violates the MOU's vacation accrual provision and benefit maintenance provision." SCAA further asserted that represented

[2] The grievance did not involve the Department of Child Support Services, which had not changed its vacation cash-out practice to require its attorneys to use vacation leave to avoid the need to cash out extra hours.

attorneys had the right to cash out vacation because the Office of the County Counsel was permitting its employees to do so.

The grievance was forwarded to the County Office of Labor Relations, which denied the grievance on November 21, 2002. The County observed that County Counsel had chosen not to manage vacation in his office, but found that each appointing authority in the four County attorney offices " 'can determine for him or herself how, when, and if they manage vacation within each respective department.' " The County based this conclusion on the vacation management provision in the personnel ordinance, SCC section 2.78.735(a).

On December 12, 2002, SCAA filed a petition for writ of mandate, seeking to compel the County to, inter alia, allow "SCAA-represented employees to maintain a 400-hour vacation leave balance, accrue vacation leave hours in excess of the 400-hour maximum and be cashed-out for any vacation leave accruals in excess of the 400-hour maximum as provided to attorneys in the County Counsel's Office . . . ."

On August 27, 2003, the trial court entered an order denying the petition for writ of mandate, after finding that (1) "department heads can manage vacation, they cannot force the attorneys to use their accrued vacation time, however they could direct them to take vacation they would earn in the future as the District Attorney has done," and (2) the County had not violated the benefit maintenance provision of the MOU because "[t]he vacation leave cash-out benefit, is not an 'increase' in benefits to County Counsel employees occurring during the effective period of the MOU."[3]

On September 29, 2003, SCAA filed a notice of appeal.

On October 28, 2003, the trial court entered its judgment denying the petition for writ of mandate.

[3] On September 2, 2003, the trial court entered an amendment to the August 27, 2003 order, in which it made four minor, non-substantive corrections to the original order.

DISCUSSION

SCAA contends the County violated the benefit maintenance provision (§ 2.3) and the vacation accrual provision (§ 6.1(c)) of the MOU by requiring attorneys in the Offices of the District Attorney and Public Defender to take vacation leave to avoid the need to cash out vacation pursuant to SCC section 2.100.090.

Since this issue involves solely questions of law, de novo review is appropriate. (See, e.g., *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1278 [when the meaning of an MOU is in dispute, we apply de novo review]; *Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [reviewing courts independently determine proper interpretation of a statute].)

A. *Alleged Violation of the Benefit Maintenance Provision*

The present legal challenge came about after SCAA learned, in April 2002, that County Counsel did not monitor vacation leave accruals in his office. According to SCAA, County Counsel's exercise of his discretion to, at all times, permit attorneys in his office to "self-monitor" vacation accruals and to cash-out any vacation leave they accrue in excess of 400 hours, constitutes a benefit to which SCAA-represented attorneys are also entitled, under the benefit maintenance provision of the MOU. We disagree.

Since its adoption in 1995, the County and SCAA have interpreted the cash-out provision to apply, by way of the MOU, to SCAA-represented attorneys. We do find that the cash-out provision conferred a benefit on attorneys in the County Counsel's Office and, pursuant to the benefit maintenance provision of the MOU then in effect, to SCAA-represented attorneys. (See SCC, § 2.100.090; MOU, § 2.3.)[4] Contrary to SCAA's contention, however, the record demonstrates that this benefit did not bestow on attorneys the automatic right to accrue vacation leave beyond 400 hours and to have the excess cashed out. Instead, it permitted them to stay on the job rather than take vacation, if so

[4] In a document entitled "Sacramento County Management Benefits," dated as of July 1995, the County listed as a benefit, "Vacation Pay-Off," under which "[h]ours in excess of maximum accrual balance are automatically paid."

needed by their department, without simply losing the vacation leave in excess of 400 hours that otherwise would have accrued.

The purpose of the cash-out provision is shown in a January 12, 1995 memorandum to the County Board of Supervisors, in which the County Executive explained the reason he recommended the provision's adoption: "Currently there is a maximum vacation balance for all employees. If the County does not allow an employee to take vacation when an employee is at maximum balance, the employee loses any accrual beyond the maximum permitted. This only serves to penalize the very employee that we feel is so essential that we cannot afford to allow him/her to [take] time off. Although we have provision for limited extension of the maximum vacation balance, it cannot go on indefinitely and is not an appropriate solution to the problem. Extending the maximum vacation balance creates future operational problems and increased payoff costs. The County needs to automatically pay off hours in excess of the maximum accrual balance."

Indeed, all parties have understood, since its adoption, that the cash-out provision is subject to monitoring and management by the County's various department heads, depending on the budgetary and administrative issues those departments faced. Chief Deputy District Attorney Cynthia Besemer, Public Defender Paulino Duran, and SCAA President Donald Steed, all acknowledged in their declarations submitted in support of and in opposition to the petition for writ of mandate, that both the Public Defender's and District Attorney's Offices periodically issued notices to attorney staff with instructions to schedule vacation hours to prevent cash payouts for excess hours. At other times, those same offices permitted attorneys to accrue over 400 hours and receive cash for the excess hours. In his declaration, Steed added that, in 1995, he had a discussion with Besemer regarding the process of monitoring vacation accruals, and that he advised her that SCAA would not file a grievance regarding the administration's efforts to monitor vacation accruals.

On the other hand, County Counsel Robert Ryan stated in his declaration in opposition to the petition for writ of mandate that, due to staffing limitations and

differing budget implications in his office, he has never monitored or managed vacation leave accruals for purposes of requiring attorney employees to take vacation leave. He also stated, however, that "it is foreseeable that the County budget and this Office may be impacted by State budget shortfalls so as to necessitate a requirement that attorney employees schedule vacation time off rather than 'cash-out' vacation accruals over the maximum of 400 hours. That is, differing levels of staffing and financing may result in a change in management of vacation leave accruals under the provisions of Section 2.100.090."

As previously discussed, County Counsel is empowered to manage vacation by virtue of SCC section 2.78.735(a). Similarly, County department heads in the offices of SCAA-represented attorneys are also empowered to manage vacation, pursuant to section 6.1(d) and (e) of the MOU. Simply because County Counsel has historically exercised his management discretion in such a way as to permit attorneys in his office to accrue more than 400 hours in vacation leave, thereby allowing them to utilize the cash-out provision, does not mean that other department heads must similarly manage their departments. Since 1995, pursuant to section 2.3 of the MOU and the stated purpose of SCC section 2.100.090, SCAA-represented attorneys have received the benefit of the cash-out provision in that, at such times as their managers have either allowed or required attorneys to stay on the job, they have received a payout for those hours accrued in excess of the 400-hour vacation leave maximum. There is nothing in any of the relevant provisions that could possibly be construed to transform County Counsel's discretionary management decisions into law for the other department heads or into an additional benefit for SCAA-represented attorneys pursuant to the benefit maintenance provision. On the contrary, the relevant provisions plainly give each department head the authority to manage vacation and to monitor the cash-out provision as he or she sees fit. (See SCC, §§ 2.78.735(a), 2.100.090; MOU, § 6.1(d), (e).)[5]

[5] County Personnel Policies and Procedures No. E-6, section 40, expressly gives management employees the right to cash in vacation as follows: "A management

In sum, parity of benefits under the benefit maintenance provision means that any ordinances or formal policies adopted by the County that increase benefits for attorneys in the County Counsel's office must also apply to SCAA-represented attorneys. It plainly does not mean that other department heads must move in lockstep with County Counsel's discretionary management decisions relating to use of the cash-out provision in his own office. (See MOU, § 2.3.)[6]

B. *Alleged Violation of the Vacation Leave Accrual Provision*

SCAA also contends the County violated section 6.1(c) of the MOU[7] by forcing SCAA-represented attorneys to reduce their accrued vacation leave balances below 400 hours.

In a memorandum dated October 16, 2002, Cynthia Besemer, Chief Deputy District Attorney, informed a supervising deputy district attorney that two employees in

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employee who has 240 hours or more accumulated vacation and the equivalent of 10 years or more full-time continuous service may elect to reduce his or her accumulated vacation by up to 40 hours in a calendar year and to receive a cash payment in lieu of the vacation." In contrast, nothing in SCC section 2.100.090 provides management employees, including attorneys, with an equivalent automatic right to accrue over 400 hours in vacation leave and to cash out the excess.

[6] The County complains that the trial court misinterpreted the scope of SCC section 2.100.090, and found that the right to demand to remain on extended duty was the benefit conferred by that section. To the extent that the trial court's order can be read to make such a finding, we, as already discussed, disagree. Moreover, we need not address the trial court's finding that County Counsel's non-management of vacation leave is not an increase in benefits during the term of the *current* MOU since County Counsel has said he has never managed vacation leave since adoption of SCC section 2.100.090 in 1995. That is because we have concluded that County Counsel's discretionary management of his office is *not* a benefit to attorneys in his office. Rather, the benefit is that an employee may cash out, rather than lose, vacation leave accrued in excess of 400 hours if he or she is required or permitted to remain on duty.

Finally, SCAA has requested, pursuant to California Rules of Court, rule 977(b)(1), that we take judicial notice of an unpublished opinion in a prior action between the County and SCAA. Because we find that the opinion in question is not necessary to our resolution of this issue, the request for judicial notice is denied.

[7] MOU section 6.1(c) provides: "Employees may accumulate vacation to a maximum of 400 hours on an accrual date."

the District Attorney's Office had reached the 400-hour maximum for vacation leave accrual, and requested, in light of the current budget crisis, that Steed submit a "plan for reducing the accrued vacation hours in order to avoid future payouts. [¶] . . . [¶] All supervisors are expected to carefully monitor vacation accruals to allow sufficient time for scheduling time off as an alternative to cash payouts. . . ." (Emphasis omitted.)

In a December 9, 2002 email memorandum, Besemer reiterated that, "[i]f you supervise someone who is eligible to be paid for vacation accrual exceeding 400 hours and has accrued 400 hours, you need to submit a plan to me identifying how that employee will reduce his/her vacation hours below 400. [¶] Personnel will send out notices to all supervisors when employees reach 350 [hours] so it will be easier to schedule the time off."

According to SCAA, these memoranda demonstrate that the County is improperly attempting to require SCAA-represented attorneys to keep vacation leave balances *below* 400 hours, in violation of section 6.1(c) of the MOU, which permits employees to accrue vacation leave up to a maximum of 400 hours. SCAA further argues that the County's requirement conflicts with the holding in *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal.App.4th 1326, 1335 (*Kistler*), in which Division Five of this District held that the Community College District's attempt to force terminated employees to take accrued vacation leave prior to their departure constituted a "forbidden forfeiture" of earned, vested vacation pay.

The court emphasized, however "that in general it is only *accrued* vacation pay which is protected against divestment or forfeiture by employer directives requiring that a vacation be taken in the future, rather than be paid for in cash at the end of the employment. No case has held that what will happen or vest in the future has already somehow become vested or accrued in the present. The rule against forfeiture of *accrued* vacation rights, by its own terms, cannot apply to vacation pay which is to be earned in the future, i.e., which has not yet accrued.

"Thus, an employer may certainly direct an employee, by specific order or general policy, to take a vacation in the future; the employer may validly bar accrual of further

vacation leave unless the specified vacation is taken. (See *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595, 1602 ['Since no more vacation is earned, no more vests. A "no additional accrual" policy, therefore, does not attempt an illegal forfeiture of vested vacation'].)

"An employer directive or policy requiring that a vacation be taken, however, cannot legally divest the employee of vacation rights already earned and accrued; and the employer may only prevent the accrual of vacation to be earned in the future.[8] To take the present case as an example, the District in April 1990 could have validly directed appellants to take vacation days equivalent to those which appellants would have earned between April 1990 [when the directive to take vacation leave was given] and June 1990, when the employment was to end; the District could have conditioned accrual of additional, future, vacation leave on this requirement, and could have prevented additional accrual by this method." (*Kistler*, *supra*, 15 Cal.App.4th at pp. 1334-1335.)

In the present case, while the cash-out provision prevents the County from instituting a "use it or lose it" vacation policy for vacation balances in excess of 400 hours without officially changing the rules with respect to all County attorneys, it certainly may inform particular employees of the need to use *future* vacation hours so that their vacation leave balances will not exceed 400 hours. (See *Kistler*, *supra*, 15 Cal.App.4th at pp. 1334-1335.)

In the recent case of *Los Angeles County Prof. Peace Officers' Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 871, the appellate court found *Kistler* inapplicable in a similar context, in which the undisputed evidence "showed that in order

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[8] In reaching this conclusion, the *Kistler* court relied in part on principles set forth in *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985 (*Bonn*), in which the appellate court has "quite properly rejected the university's claim, that its power to approve or disapprove the *timing* of an employee's proposed vacation plans also allowed it to exercise the quite different power of requiring an employee to go on an unwanted *forced* vacation, prior to leaving employment, so as to evade its contractual and legal obligation to pay the employee for his accrued vacation balance upon termination." (*Kistler, supra*, 15 Cal.App.4th at p. 1331, citing *Bonn*, at p. 991.)

to avoid cash buy-outs of excess vacation time, the D.A. made employees take vacation when needed to bring their accrued time under the 320 hour limit." As the court explained: "As we understand the County's policy and practice, no employee ever forfeited accrued vacation time. Instead, the County allowed its workers to accrue up to 320 hours of vacation time, but tried its best to have employees take any vacation hours over that amount. If they could not due to the demands of their work schedules, the employees would be fully compensated at year's end for the loss of any remaining excess vacation." (*Id*. at p. 872.)

We agree with SCAA that, to the extent the County would require that SCAA-represented attorneys use already accrued vacation leave to reduce their vacation balances below 400 hours, such a directive would violate both section 6.1(c) of the MOU and *Kistler*. The County asserts, however, that "the SCAA-represented attorneys are not being forced to take unwanted vacations to deplete their accruals. Rather, they are being required to manage their vacation so that they do not *exceed* the stated maximum of 400 hours, to avoid the necessity of their appointing authorities cashing out accruals over 400 hours."[9]

We conclude that, while the two memoranda in question were perhaps inartfully worded, the County is not compelling SCAA-represented attorneys who are at or near the 400-hour maximum for vacation leave accrual to forfeit vacation leave already accrued. Rather, it requires supervisors to inform the attorneys of the need to take vacation leave accrued in the future to avoid *exceeding* the 400-hour maximum. Such a directive conflicts with neither section 6.1(c) of the MOU nor *Kistler, supra,* 15 Cal.App.4th 1326.

The petition for a writ of mandate was properly denied.[10]

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[9] In her declaration, Besemer stated that, when necessary, she "would provide general notice to the attorneys in the office of the requirement to take vacation leave rather than permit vacation accruals to *exceed* the maximum of 400 hours." (Italics added.)

[10] The parties dispute whether the District Attorney's and Public Defender's periodic monitoring of vacation leave accruals constitutes a binding past practice. (See

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal.

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Kline, P.J.

We concur:

_____
Haerle, J.

_____
Ruvolo, J.

Riverside Sheriff's Assn. v. County of Riverside (2003) 106 Cal.App.4th 1285, 1291 [to be a binding past practice, practice " 'must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.' "].) Because this question is unnecessary to our resolution of the issues raised on appeal, we shall not address it.